

OFFICE OF THE DISTRICT ATTORNEY
CITY AND COUNTY OF PHILADELPHIA

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**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
TRIAL DIVISION, CRIMINAL SECTION**

COMMONWEALTH OF PENNSYLVANIA

vs.

MARQUISE NOEL

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CP-51-CR-0002562-2018

RULE TO SHOW CAUSE

AND NOW, to wit, this day of 2018, it is hereby ORDERED and
DECREED that the defendant show cause why the within Motion to Disqualify in the
above-captioned case should not be granted.

A hearing is fixed on the day of , 2018 in Courtroom 507
Criminal Justice Center, Philadelphia, Pennsylvania.

BY THE COURT:

J.

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CP-51-CR-0002562-2018

ORDER

Upon consideration of the Commonwealth's Motion to Disqualify, it is by the
Court this day of , 2018, ORDERED and DECREED that the
said Motion to Disqualify is GRANTED.

BY THE COURT:

J.

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CP-51-CR-0002562-2018

**COMMONWEALTH'S MOTION TO DISQUALIFY WILLIAM DAVIS, ESQ. AND THE
LAW FIRM OF MCMONAGLE PERRI MCHUGH MISCHAK DAVIS FROM
REPRESENTING THE DEFENDANT IN THIS CASE**

Commonwealth of Pennsylvania submits the instant Motion to Disqualify William Davis, Esq., and his firm, McMonagle Perri McHugh Mischak Davis ("McMonagle Perri" or "the firm"), from representing the Defendant Marquise Noel ("Defendant") in this matter, for the reasons discussed herein.

Discovery of Facts That Support the Existence of a Conflict

1. On the afternoon of December 19, 2018, a supervisor in the District Attorney's Office received a text message on his personal cell phone from Mr. Davis indicating that he represented Defendant in the above referenced case and he wanted to speak with the supervisor.
2. The supervisor returned Mr. Davis's phone call at 1:30 PM, which resulted in a conversation about the case.

3. During the conversation, Mr. Davis relayed the facts of the case, specifically claiming that a black LG flip cell phone was the key piece of evidence against Defendant.

4. Mr. Davis then told the supervisor that he had irrefutable evidence that Detective Freddie Mole, the Detective in the case who testified during the preliminary hearing, had lied under oath about his search of the cell phone.

5. Mr. Davis also said to the supervisor, "I've known you a long time, and you know me from when I worked in the office. I don't want to end anyone's career."

6. Mr. Davis elaborated that he had video surveillance footage from the date of the offense of Detective Mole and Detective Joseph Murray, a second detective who worked the case, looking at the contents of Defendant's flip phone in the hospital, time-stamped several hours before the search warrant for the cell phone was issued.

7. Mr. Davis asked whether, in light of this strong, irrefutable evidence and its sensitive nature, the District Attorney's Office would consider offering Defendant something attractive, perhaps in the mitigated range (such a sentence would be outrageously low and practically unheard of given the charge). Mr. Davis then noted that if that were to happen, this video would not be available as a matter of public record.

8. Mr. Davis stated that he had not yet discussed any type of non-trial disposition with Defendant.

9. When asked for the video footage, Mr. Davis was initially reluctant to provide it to the supervisor, stating that "[he] would prefer not to send the video at this time."

10. The supervisor informed Mr. Davis that perjury charges were possible and that might be a problem since Mr. Davis's firm has a contract with the Fraternal Order of Police to provide legal services to its members that are police officers.

11. Mr. Davis stated he had informed Fred Perri, his partner, of the situation and Mr. Perri did not believe a conflict existed.

12. The supervisor ended the conversation with no commitment from Mr. Davis to provide the video footage.

13. A short while later, the supervisor called Mr. Davis and again requested the video footage.

14. Mr. Davis asked the supervisor if he would keep the video footage confidential if it were provided to the District Attorney's Office.

15. Mr. Davis sent the video footage to the supervisor via email at 3:37 PM on that same date.

16. The supervisor's conversation with Mr. Davis was the first time any member of the District Attorney's Office was made aware that Detective Mole or Detective Murray viewed the contents of Defendant's cell phone prior to the issuance of the search warrant.

17. That same conversation was also the first time any member of the District Attorney's Office had reason to suspect that Detective Murray had not been truthful when he swore out his affidavit of probable cause and affirmed the time of the search, and the first time any member of the District Attorney's Office had reason to suspect that Detective Mole had not been truthful when he testified at the preliminary hearing.

The Relevant Facts of the Homicide Investigation and the District Attorney's Office Review of the Video Footage¹

18. On December 19, 2018, the supervisor and three assistant district attorneys reviewed the video footage as well as the case file, specifically including the notes of testimony from the preliminary hearing and the search warrant issued to seize the contents of Defendant's cell phone.

19. The relevant underlying facts of the homicide investigation reveal that on February 11, 2018, at approximately 1:58 PM, Philadelphia police officers responded to the scene of a shooting at 7500 Elmwood Avenue, where they found the decedent in this case, Tafari Lawrence, having suffered several gunshot wounds. Mr. Lawrence was subsequently transported to Presbyterian Hospital and pronounced dead at 2:18 PM.

20. Coincidentally, Defendant was also admitted to Presbyterian Hospital at approximately the same time. Defendant told police that he was shot during a robbery at 58th and Baltimore, at or near a Checkers restaurant. However, when police went to that location, it became apparent that no such robbery had taken place.

21. Defendant's clothing and personal effects were removed at Presbyterian Hospital and placed into a bag.

22. Surveillance footage from the Trauma Bay of the Emergency Department at Presbyterian Hospital reflects Detective Mole, walking into the area of the Emergency Department where decedent's body was located, putting on a pair of

¹ Attached to this motion as Exhibit A are five still photographs captured from the video footage with redactions for privacy reasons. These photographs illustrate the facts described in paragraphs 23 through 28.

glasses, and removing a black flip phone from his jacket pocket at 3:28 PM. Two other men are present, including Detective Murray.

23. According to the time stamp on that surveillance footage, at 3:28:10 PM, Detective Murray acknowledges Detective Mole, and at 3:28:11 PM, Detective Mole opens the cell phone.

24. Over the course of the next ten seconds (3:28:11 - 3:28:21), the three men converse, Detective Mole raises the cell phone to show it to Detective Murray and the third man, and the third man gives Detective Mole the “thumbs up” sign.

25. Over the course of the next twenty seconds (3:28:11 - 3:28:41), Detective Murray and the third man continue to examine the body of the decedent, while Detective Mole visibly pushes buttons on the open phone, causing light to emit from the screen.

26. As Detective Mole continues to look at the open phone and push buttons, Detective Murray and the third man finish examining the decedent’s body and Detective Murray removes clothing from a brown paper bag. Medical personnel return to this area, and at 3:30:21, Detective Mole is still visibly holding the open phone with a lit screen. One minute later (at 3:31:21), Detective Mole again appears in the frame, with the phone still open and the screen still lit.

27. At 3:31:40, Detective Mole and Detective Murray begin to leave the area, with Detective Mole still holding the open phone.

28. At 3:31:44, Detective Mole and Detective Murray look at the open, lit phone together. Detective Mole uses his finger to point at different parts of the screen while Detective Murray looks at the phone. Both detectives are visibly talking to each other while they both look at the phone. At 3:32:14, Detective Murray finishes looking at the phone and leaves the area. He is followed shortly thereafter by Detective Mole and the third man.

29. Other personnel come and go from this general area during this footage; however, all of the above is clear and unambiguous.

30. The two detectives and the third man ultimately exit the frame of the footage at approximately 3:40:50; Detective Mole is carrying a brown paper bag that is similar to the bag from which Detective Murray removed and examined clothing in the area near the decedent’s body.

31. Subsequently on February 11, 2018, Detective Murray swore out an affidavit for a search warrant. The application described the items to be searched as: “Electronic contents of black LG cell phone to include the phone number, owner info, text messages, call logs, web browser history, emails, maps, notes, contacts and all items of evidentiary value[,]” and describe the “premises and/or persons to be

searched” as “Black LG cell phone - flip phone - AT&T logo on front.”

32. Detective Murray’s probable cause affidavit describes the shooting of the decedent; Defendant’s account of a robbery at 58th and Baltimore; and the discovery that there was no such robbery.

33. Detective Murray’s affidavit then describes Defendant’s gunshot wound to the leg and stated that it did “not match Noel’s story”; it describes Defendant’s clothing potentially being consistent with surveillance footage of the possible shooters, one of whom was limping while running; and it states that “Noel was in possession of a black cell phone (LG flip-phone).”

34. Detective Murray concludes as follows: “Based on the physical evidence and Noel’s version of events, your affiant believes Noel was not shot at 58th and Baltimore Ave, but was wounded during the shooting of Lawrence and Alexander. In an effort to recover evidence in the above listed homicide, your affiant respectfully requests a search and seizure warrant for Noel’s black LG phone to obtain a phone number for cell site data, text messages to determine contact before and after the shooting, and call logs to determine calls made before and after the shooting.”

35. A note on the application reflects that the application was approved by ADA Levenberg on February 11, 2018, at 7:19 PM, and the warrant was signed by the magistrate on February 11, 2018 at 8:00 PM after noting that the probable cause described by Detective Murray was “duly sworn (or affirmed).”

36. In the boxes designated for “Result of Search,” the face of the warrant reflects that the date and time of the search were “2-11-18” at 8:20 PM, and that the “property seized” was “cell phone contents.”

37. Detective Murray “certif[ied], subject to the penalties and provisions of 18 Pa. C.S. § 4904(b) that this is a true and correct listing of all [items] seized.”

38. On April 3, 2018, a preliminary hearing was conducted in this matter before Hon. Thomas Gehret. Mr. Davis appeared on behalf of Defendant, and ADA Jason Grenell appeared on behalf of the Commonwealth.

39. Detective Mole testified for the Commonwealth at the preliminary hearing.

40. On direct examination, ADA Grenell asked Detective Mole the following questions:

Q: As part of the investigation, did you ever obtain physical evidence or anything from the defendant in this case?

A: Yes. I did obtain the defendant’s clothing and a cell phone with his effects.

...

Q: Was there anything about the location of the gunshot wound and the defendant's story that you, as a detective, made you inquire further?

A: Yes. Once I knew he was shot at the location he told me, I began to do further investigation and the cell phone itself was the focus at that point.

Q: Where was that recovered from?

A: It was recovered in the trauma bag at Presbyterian Hospital with his clothing.

Q: Taken from?

A: It was taken from him. His clothing was cut off of him and the phone was in the bag with the clothing.

Q: Did you have an opportunity to review the phone?

A: I received a search warrant for the contents of the cell phone and for the cell sites where the phone had been to track the phone.

Q: Were you able to look inside of the phone and see if there were communications from the phone recovered from the clothing?

A: Yes. Once I had a warrant, I had a chance to look in the phone and there was a conversation pertaining to the actual shooting at 75 and Elmwood.

41. On cross examination, Mr. Davis asked Detective Mole the following questions:

Q: And after you spoke to my client and he tells you about being shot at 59th and Baltimore, you go through the personal effects and you seized the clothes and the cell phone?

A: That's correct.

Q: And at that point, given your suspicions or distrust of my client's statement, did you look in the phone to see if there is something to point you in a different direction?

A: Not yet. I went back to headquarters and started the search warrant and get the contents and cell phone information.

The Law Regarding Perjury and False Statements

42. 18 Pa. C.S. § 4902(a) defines perjury as the making of a false statement under oath or equivalent affirmation in any official proceeding when the statement is material and the person making it does not believe it to be true. It is a felony of the third degree.

43. 18 Pa. C.S. § 4903(a) defines false swearing in official matters as the making of a false statement under oath or equivalent affirmation when the person does not believe the statement to be true and either the falsification occurs in an official proceeding or the falsification is intended to mislead a public servant in performing his official function. It is a misdemeanor of the second degree.

44. 18 Pa. C.S. § 4904(a)(1) defines unsworn falsification to authorities as the making of a written false statement when the person does not believe the statement to be true and it is made with the intent to mislead a public servant in performing his official function. It is also a misdemeanor of the second degree.

45. It is a misdemeanor of the third degree to make a false statement “under penalty” (under 18 Pa. C.S. § 4904(b)) whereupon a person “makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.”

The Law Regarding Conflicts and Disqualification

46. The Commonwealth moves to disqualify Mr. Davis from further representation of Defendant at this time because Mr. Davis has a conflict of interest such that he cannot provide effective assistance of counsel to Defendant, and the conflict cannot be cured by waiver.

47. The Court is permitted to disqualify an attorney, even over the objections of the client, if the Court is persuaded that there is a serious potential for a conflict of interest. Moreover, it is reversible, constitutional error not to disqualify an attorney (or inquire further) if an actual conflict of interest exists.

48. “To show an actual conflict of interest, the appellant must demonstrate that: (1) counsel ‘actively represented conflicting interests’; and (2) those conflicting interests ‘adversely affected his lawyer’s performance.’” *Commonwealth v. Collins*, 598 Pa. 397, 420 (2008)(quoting *Commonwealth v. Hawkins*, 567 Pa. 310, 320 (2001)).

49. “An actual conflict of interest ‘is evidenced whenever during the course of representation, the interests of appellant--and the interests of another client

towards whom counsel bears obligations--diverge with respect to a material factual or legal issue or to a course of action.” *Commonwealth v. Tedford*, 598 Pa. 639, 728 (2008)(quoting *In Interest of Saladin*, 518 A.2d 1258, 1261 (Pa. Super. 1986). See also *Commonwealth v. Kelly*, 316 Pa. Super. 438, 446 (Pa. Super. 1983)(“Thus, what we must search for in the proceedings below is the presence of an *actual conflict of interest*. This manifests itself by a showing of a possibility of harm to the defendant. Actual harm need not be shown.”)(emphasis in original).

50. “Representation of a criminal defendant entails certain basic duties. Counsel’s function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984)(citing *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980)). The Pennsylvania Supreme Court has recognized that an “allegation of ineffectiveness put forth [in the form of a breach of the duty of loyalty owed from counsel to client] is disturbing as it asserts a total disintegration of the function of trial counsel, implying a violation of the ethical standards of the profession, a dereliction of counsel’s duty to the court, and a profound failure to the client. The constitutional right to counsel in a criminal proceeding is essential to the basic guarantee of a fair trial in our adversarial system of justice.” *Commonwealth v. Washington*, 583 Pa. 566, 580-81 (2005).

51. It should be noted, however, that this Court may also disqualify Mr. Davis and his firm in this pre-trial posture upon a showing only “of serious potential for conflict.” See *Wheat v. United States*, 486 U.S. 153, 164 (1988)(“Viewing the situation as it did before trial, we hold that the District Court’s refusal to permit the substitution of counsel in this case was within its discretion and did not violate petitioner’s Sixth Amendment rights [to his counsel of choice]. . . . The District Court must recognize a presumption in favor of petitioner’s counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict.”).

52. The Third Circuit has recognized this lower standard, describing *Wheat* as having “held that ‘the District Court must be allowed substantial latitude in refusing waivers of conflict of interest not only in those rare cases where an *actual conflict* may be demonstrated before trial, but in the more common cases where a *potential for conflict* exists which may or may not burgeon into an actual conflict as the trial progresses.” *United States v. Moscony*, 927 F.2d 742, 750 (3d Cir. 1991)(quoting *Wheat*, 486 U.S. at 163)(emphasis in *Moscony*).

53. Present here is an actual conflict of interest within the meaning of *Collins* and *Tedford*. In the alternative, there is indubitably a serious potential for conflict under *Wheat* and *Moscony*.

54. In light of this substantial, actual conflict of interest, the Court should disqualify Mr. Davis after ruling that this conflict is, on the record before the Court, not waivable by Defendant.

Multiple Conflicts

55. Mr. Davis actually possesses a conflict of interest on two separate theories of conflict. The first theory relates to the conflict between Defendant and Mr. Davis's firm's potential future clients who are police officers. The second theory relates to the conflict between Defendant and Mr. Davis himself.

Conflict Between Interests of Defendant and Police Officers

56. First, Defendant's interests have diverged with respect to a course of action from the interests of Mr. Davis's law firm's potential future clients: Detectives Mole and Murray as members of the Fraternal Order of Police.

57. Searching the contents of a cell phone without a warrant and absent exigent circumstances is unconstitutional. *Riley v. California*, 573 U.S. ____ (2014). Violating the constitutional rights of citizens and then lying about doing so in official proceedings would expose police officers who did so to internal discipline within the police department, as well as potential civil or criminal proceedings.

58. McMonagle Perri has contracted with the Fraternal Order of Police, the union to which Detectives Mole and Murray belong, to provide legal representation to officers who find themselves facing internal disciplinary action as well as criminal cases. See *Air Line Pilots Ass'n, Intern. V. O'Neill*, 499 U.S. 65, 74-75 (1991) ("some Members of the Court have . . . likened the relationship between union and employee to that between attorney and client. . . [A] union owes employees a duty to represent them adequately as well as honestly and in good faith. See . . . *Strickland v. Washington*, 466 U.S. at 686 (lawyer must render 'adequate legal assistance')[.]"); *Kelly*, 316 Pa. Super. at 441 ("Both attorneys were retained by the Philadelphia Fraternal Order of Police as part of its service for the defense of accused police officers").

59. The Commonwealth notes that these officers are not potential future clients of McMonagle Perri in the same way that any consumer of legal services might choose to retain the firm. Instead, McMonagle Perri is contractually obligated to provide legal services for police officers in disciplinary and criminal proceedings of precisely the kind that Detectives Mole and Murray may face. This brings their interests as future clients of McMonagle Perri from the realm of speculative to actual.

60. This is supported by Mr. Davis representing that his partner, Fred Perri, had already considered the firm's role as providing legal services to FOP members before the ADA with whom Mr. Davis spoke raised that concern (notwithstanding that Mr. Perri apparently disagreed about whether there was a conflict of interest).

61. This dual role places Mr. Davis and his firm in the position of potentially representing two opposing sides in closely related cases.

62. At any proceedings arising out of the circumstances described above, it will be in the interests of Detectives Mole and Murray to put forward evidence to suggest that the contents of the cell phone were not obtained in contravention of the Constitution. However, that would be diametrically opposed to Defendant's interests, as he would hope to establish instead that the contents of the cell phone--a critical piece of evidence in a murder prosecution--should be suppressed as a result of allegedly unconstitutional police practices.

63. It will also be in the interests of Detectives Mole and Murray to allay or minimize accusations that they were not truthful in their statements about when they viewed the contents of the cell phones. However, such minimization would also be diametrically opposed to Defendant's interests, as he would want to show a lack of honesty on the part of two important proposed Commonwealth witnesses and thereby impeach their credibility to the finder of fact in the murder prosecution.

64. Both of these are sufficient to establish an actual conflict of interest, as they show how the interests of Mr. Davis and his firm diverge as to their clients: Defendant on the one hand, and the FOP and its members who may be accused of misconduct on the other. "It is clear that an actual conflict of interest arises when a defense attorney 'owes duties to a party whose interests are adverse to those of the defendant.'" *United States v. Martinez-Zayas*, 655 F. Supp. 682, 683-84 (E.D.Pa. 1987)(quoting *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir.), *cert. denied*, 444 U.S. 833 (1979)).

65. To be clear, the actual event need not come about in each set of proceedings in order to constitute an "actual conflict of interest" rather than a potential one. It is enough that the interests of two sets of clients have diverged so substantially about issues at the heart of each set of cases.

66. Moreover, the Court should find that these conflicting interests in fact already adversely affected Mr. Davis's representation of Defendant, although trial has not yet begun.

67. The video surveillance footage contains strong evidence that the detectives in this case viewed the contents of the cell phone without a warrant. Such evidence could be dispositive should Defendant's counsel move to suppress those contents on Fourth Amendment grounds. Here, the text messages that were on that cell phone, as well as the cell site records, are critical evidence against Defendant on the murder charge. The Commonwealth will be limited in its ability to press for an alternative theory of admissibility (*e.g.*, independent source or inevitable discovery) at such a hearing should Detectives Mole and Murray be advised not to answer further questions under oath on Fifth Amendment grounds (and it is the position of the

District Attorney's Office that they be so advised).

68. Should that evidence be suppressed, the Commonwealth would have to rely on and/or seek additional evidence to meet its burden of proving the charges against Defendant beyond a reasonable doubt.

69. In short, the video surveillance footage places Defendant in a position of relative strength.

70. That position is undercut substantially, however, by Mr. Davis's request that the District Attorney's Office offer Defendant a plea that requires Defendant to serve a substantial jail sentence. Moreover, there is no apparent benefit to Defendant if the video surveillance footage does not, as Mr. Davis suggested, become widely viewable. The benefit of that, instead, inures solely to the officers depicted in the footage.

71. This request for a plea bargain under these circumstances, which would place Defendant in prison for years so that the officers depicted would not be embarrassed or have their careers "end[ed]" illustrates that Defendant's interests have diverged from the interests of Mr. Davis's firm's future clients. There is an actual conflict, and it has affected Mr. Davis's performance.

72. Courts have recognized the potential pecuniary conflict of interest an attorney may have in the business of future clients and not alienating those potential clients:

"In cases in which the alleged conflict of interest is based on the prior representation of a prosecution witness by defense counsel, the courts have examined the particular circumstances to determine whether counsel's undivided loyalties reside with his current client. In such cases there are two factors that arguably may interfere with effective cross examination and, therefore, the effective assistance of counsel. First is concern that the lawyer's pecuniary interest in possible future business may cause him to avoid vigorous cross-examination which might be embarrassing or offensive to the witness. The second is the possibility that privileged information obtained from the witness might be relevant to the cross-examination."

Commonwealth v. Munson, 419 A.2d 343, 347 (Pa. Super. 1992)(quoting *United States v. Jeffers*, 520 F.2d 1256-1265 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976).

Conflict of Interest Between Mr. Davis and Defendant

73. In addition to the actual conflict of interest that has arisen because the interests of Defendant and McMonagle Perri's potential future clients have diverged so substantially, there is a second conflict of interest between Defendant and Mr. Davis himself. Because this conflict of interest has affected Mr. Davis's defense of his

client in this matter, Mr. Davis may be subject to professional discipline on ethical grounds in a matter directly relating to his representation of Defendant, which creates another actual conflict of interest. *See, e.g.*, cmt. ¶ [10], Pa. R. Prof. Conduct 1.7 (“[I]f the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.”).

74. Mr. Davis is subject to the Pennsylvania Rules of Professional Conduct. These rules require him, *inter alia*, to abide by Rule 1.7, governing conflicts of interest among current clients, which states that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . the representation of one client will be directly adverse to another client; or . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” Pa. R. Prof. Conduct 1.7(a)(1)-(2). Moreover, it is without question that the conflicts at issue here are imputed across the firm of McMonagle Perri. Pa. R. Prof. Conduct 1.10(a).

75. These parties are necessarily adverse to each other with regard to these factual circumstances. For instance, it is not difficult to imagine that any potential criminal prosecution of the police officers here could rely in part of Defendant’s testimony against them, at which point he would be subject to cross-examination by a lawyer of the firm that represented him on this very matter.

76. Because of this hopeless entanglement of the interests of these very adverse parties, an actual conflict of interest exists here as well.

77. As Mr. Davis has arguably raised questions about his adherence to the above-mentioned Pennsylvania Rules of Professional Conduct, he now has his own interest in forestalling any professional discipline that would arise from his representation of Defendant in this case. The attorney’s own exposure to professional discipline relating to a case has been deemed to create a conflict of interest. *See, e.g., Gov’t of Virgin Islands v. Zepp*, 748 F.2d 125, 138 (3d Cir. 1984).

Request for Relief

78. The Commonwealth requests disqualification of Mr. Davis and McMonagle Perri for the reasons stated above. The Court should appoint substitute counsel on behalf of Defendant in this matter.

79. “[T]he trial court has an institutional interest in protecting the truth-seeking function of the proceedings over which it is presiding by considering whether the defendant has effective assistance of counsel, regardless of any proffered waiver. *Moscony*, 927 F.2d at 749.

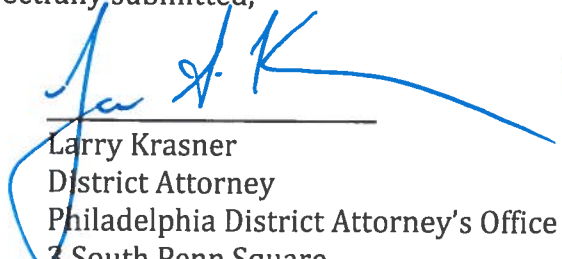
80. "Finally, the court has an independent in protecting a fairly-rendered verdict from trial tactics that may be designed to generate issues on appeal." *Id.*

81. Should the Court find it prudent, the Commonwealth requests in the alternative that the Court "conduct an evidentiary hearing or factual inquiry to determine whether disqualification is appropriate and . . . inquire into the nature of the conflict and the client's awareness of the conflict. The [C]ourt should also determine whether there has been a waiver of the conflict, whether the waiver was effective or whether a waiver was possible." *Zepp*, 748 F.2d at 139.


82. Should the Court wish to hold such a hearing or conduct such an inquiry, the Commonwealth requests that the Court appoint Defendant an independent attorney for the purpose of advising him as to the conflicts issue. *See Williams v. United States*, No. 13-1377, 2014 WL 4060263, at *14 (W.D.Pa. Aug. 14, 2014).

83. Should Defendant, upon consideration and with the benefit of the advice of such an independent attorney, seek to waive the conflicts of interest at issue here, the Court should consider disallowing such a waiver in light of the Court's independent obligation to ensure effective assistance of counsel and the conduct of this matter in accordance with the Pennsylvania Rules of Professional Conduct. *See United States v. Arnold*, 913 F. Supp. 348, 350 (E.D.Pa. 1995) ("Not only when an actual conflict is found, but when there is a showing of a serious potential for conflict . . . the presumption in favor of a defendant's counsel of choice is overcome and the trial court may disqualify counsel and reject the defendant's waiver of conflict") (quoting *Moscony*, 927 F.2d at 750). "In the present circumstances, we doubt that anyone could be sufficiently prescient to foresee the exact path this case will take either in the time remaining before trial or at trial. A number of unforeseen turns have already occurred. If the court does not act to obviate the conflicts now, it may be too late to do so in the event these conflicts arise during the trial itself. . . . Looking down the road, it is appropriate to take steps now to avoid a collateral attack for ineffectiveness of counsel should a conviction result." *United States v. Stewart*, No. 96-583, 1997 WL 611594, at *3 (E.D.Pa. Sept. 24, 1997) (citing *Wheat*, 486 U.S. at 161-62 and Pa. R. Prof. Conduct R. 1.7(1)-(2).)

Respectfully submitted,



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CERTIFICATION OF SERVICE

I hereby certify that today, December 20, 2018, I sent, via first class mail, fax or electronic delivery, a copy of the foregoing MOTION to the following parties:

The Honorable Barbara A. McDermott
Rm. 1418 Stout Justice Center
1301 Filbert Street
Philadelphia, PA 19107

William Davis, Esquire
1845 Walnut Street, Fl 19
Philadelphia, PA 19103



LARRY KRASNER
District Attorney



PATRICIA CUMMINGS
Assistant District Attorney

OFFICE OF THE DISTRICT ATTORNEY
CITY AND COUNTY OF PHILADELPHIA

BY: District Attorney Larry Krasner
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IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
TRIAL DIVISION, CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA

vs.

MARQUISE NOEL

CP-51-CR-0002562-2018

VERIFICATION

The undersigned hereby verifies that the facts set forth in the foregoing motion are true and correct to the best of my knowledge, information and belief. This verification is made subject to penalties for unsworn falsification to the authorities under 18 Pa. C.S. Section 4904.


LARRY KRASNER
District Attorney


PATRICIA CUMMINGS
Assistant District Attorney

Date: 12/20/10

EXHIBIT A



2/11/2018 3:31:20 PM
Eastern Standard Time



2/11/2018 3:31:41 PM
Eastern Standard Time



2/11/2018 3:31:45 PM
Eastern Standard Time



2/11/2018 3:31:49 PM
Eastern Standard Time



2/11/2018 3:32:11 PM
Eastern Standard Time